

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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EDWARD McSWAIN, an individual;
and LAURA McSWAIN, an individual,

2:11-CV-01044-PMP-GWF

Plaintiffs,

ORDER

vs.

WELLS FARGO HOME MORTGAGE,
a division of WELLS FARGO BANK,
N.A., a foreign corporation; NATIONAL
DEFAULT SERVICING
CORPORATION.

Defendants.

Before the Court for consideration is Defendant's fully briefed Motion to Dismiss (Doc. #7) filed July 1, 2011. By this motion, Defendant Wells Fargo seeks dismissal of Plaintiffs' Complaint filed May 31, 2011 in the Eighth Judicial District Court, in and for the County of Clark, State of Nevada, and removed to this Court on June 24, 2011.

The Court finds for the reasons set forth in Defendant's Motion (Doc. #7) and Reply Memorandum (Doc. #16), Defendant's Motion to Dismiss should be granted.

Specifically, the Court finds that Plaintiffs' Breach of Contract Claim fails as a matter of law. The "Approval Conditions" are not ambiguous and clearly require that Plaintiffs' request the "Desk Review" referenced therein, which Plaintiffs' did not.

1 Additionally, the allegations in Plaintiffs' Complaint do not establish a special
2 relationship between the parties giving rise to a fiduciary relationship. Defendants'
3 are entitled to dismissal of Plaintiffs' Claim for Breach of Contract. Having failed to
4 prove the existence of a fiduciary duty on the part of Wells Fargo to disclose
5 information in appraisals of the property in question, Plaintiffs' Claim for Breach of
6 the Covenant of Good Faith and Fair Dealing also fails.

7 Plaintiffs' Claim for Injunctive Relief fails because Plaintiffs' have an
8 adequate remedy at law and have not established a reasonable likelihood of success
9 on the merits of their claims.

10 Plaintiffs' Unjust Enrichment Claim must be dismissed because an
11 expressed contract exists between parties.

12 Plaintiffs' Claims for Negligent Misrepresentation and Fraudulent
13 Concealment fail because Plaintiffs have failed to allege with particularity the nature
14 of the fraud in question. As argued by Defendant Wells Fargo in its reply
15 memorandum, Plaintiffs argument here is essentially that because Wells Fargo did not
16 complete a "desk review," it intended to induce Plaintiffs into a mortgage loan
17 because Wells Fargo knew the initial appraisal of the property was false. Such
18 allegations are not sufficient to support Plaintiffs claim, and Plaintiffs further fail to
19 show that they justifiably relied upon any false representations by Defendant Wells
20 Fargo.

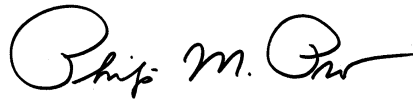
21 Finally, Plaintiffs Claim Under the Truth in Lending Act must be
22 dismissed because the failure to conduct an appraisal of the subject property cannot be
23 construed as equivalent to mischaracterization of an appraisal, and also because
24 Plaintiffs TILA Claim is time barred by the one year statute of limitations provided
25 under 15 U.S.C. § 1639e(b)(2).
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1 **IT IS ORDERED that** Defendant Wells Fargo Bank's Motion to Dismiss
2 (Doc. #7) is **GRANTED**.

3 **IT IS FURTHER ORDERED that** the Clerk of Court shall forthwith
4 enter judgment in favor of Defendants and against Plaintiffs' Edward McSwain and
5 Laura McSwain.

6 **IT IS FURTHER ORDERED that** the Lis Pendens recorded by the
7 Plaintiffs against the subject property is hereby expunged.

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9 DATED: August 2, 2011.

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PHILIP M. PRO
13 United States District Judge
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